In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-438

MOBIL OIL CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

This case involves the validity under the Natural Gas Act of the Federal Power Commission's order fixing just and reasonable rates for the interstate sale of natural gas by independent producers in the Other Southwest producing area. The court of appeals upheld the order, and we think the decision is correct. The issues presented in the petition for certiorari, however, are substantially identical to those presented by the petitions in the *Southern Louisiana* area rate cases (Nos. 73-437, 73-457, and 73-464), which we have urged the Court to grant and set for oral argument this Term. For the reasons stated in this memorandum, we believe it would be appropriate for the Court to defer disposition of the present petition pending final disposition of the *Southern Louisiana* area cases.

1. On February 28, 1967, the Federal Power Commission instituted the present proceeding to determine just and reasonable rates for sales of natural gas by producers in the Other Southwest producing area.[1] After extensive hearings, the Commission, on October 29, 1971, issued Opinion No. 607 and an accompanying order (C.A. App. 298-420), which placed substantial reliance on the Commission's earlier opinions establishing just and reasonable rate structures for the Southern Louisiana and Texas Gulf Coast producing areas.[2]

The order established area ceiling rates which vary from 18.25 cents to 27.0 cents per Mcf (thousand cubic feet) of gas, depending upon the geographical sub-area, the "vintage" of the gas (*i.e.*, the date of the contract under which it is delivered), and the date of its actual delivery.[3] A five-year moratorium was imposed on the filing of rate increases above the applicable area ceiling rates (C.A. App. 332), but provision was made for waiver of the moratorium in specific circumstances where such relief would be justified (*id.* at 342).

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[1]The Other Southwest area consists of Arkansas, Mississippi, and portions of Alabama, Louisiana, Oklahoma, and Texas (C.A. App. 2-31). ("C.A. App." refers to Part I of the joint appendix in the court of appeals, copies of which were filed by petitioner together with the petition.)

[2]The Southern Louisiana rate order was upheld in *Placid Oil Co.* v. *Federal Power Commission*, 483 F. 2d 880 (C.A. 5), pending on petitions for writs of certiorari, Nos. 73-437, 73-457, and 73-464. The Texas Gulf Coast rate order was set aside in *Texas Gulf Coast Area Natural Gas Rate Cases*, C.A.D.C., Nos. 71-1828, *et al.*, decided August 24, 1973, pending on petitions for writs of certiorari, Nos. 73-966, 73-967, 73-968, and 73-969.

[3]The Commission summarized the rates in a table that appears at C.A. App. 314.

The order provided for refunds by producers who had collected rates in excess of the maximum prior to the issuance of the Commission's order (*id.* at 333). As an incentive to elicit new supplies of natural gas for the interstate market, however, the Commission later ordered that each producer would be entitled to a credit of one cent toward the reduction of its total refund obligation for each additional Mcf of gas committed by that producer to interstate commerce prior to January 1, 1976 (C.A. App. 549, 552-554.)[4]

2. The court of appeals upheld the order (Pet. App. 3-29). It stated at the outset that, "[b]ecause of the similarity in proceedings and heavy reliance by FPC on its [*Southern Louisiana*] approach * * *, many of the legal issues which we are required to decide to effectively review this case are controlled by our decision in [the *Southern Louisiana* case]" (*id.* at 5). It accordingly rejected contentions that the Commission's "use of cost-of-service as a point of departure can no longer be justified," that the Commission "failed to take full account of the competitive effect of intrastate prices in establishing the permissible ceilings for * * * interstate rates," and that "the rate structure is not supported by the evidence in the record" (*id.* at 16).

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[4]The Commission originally determined not to permit such reductions of refunds, because it believed that the total amount of the area-wide refund obligations was so small that "a refund credit would not provide an incentive to any materially increased exploration and development program" (C.A. App. 333). On reconsideration, however, it concluded that, "although the resulting stimulus may not be great, in this time of increasing gas supply stringency every incentive should be applied which may help to alleviate the situation" (*id.* at 549). It found that the refund credit program "will tend to provide an additional stimulus which area price levels alone can not in this area" (*id.* at 566).

The court observed, however, that the Commission's order differed in several respects from its orders in some other parallel area rate proceedings. It noted that the rates for "flowing" gas (*i.e.*, gas delivered under contracts dated prior to October 1, 1968) were based on older cost data (*id.* at 7-8), reflected a lower rate of return (*id.* at 23), and gave less weight to an "exploration and development component" (*ibid.*) than the similar rates for certain other areas. The Commission's "method of allocating expenses between oil and gas produced in association" was also different (*id.* at 23-25). In addition, the court expressed reservations about the wisdom of the five-year moratorium on rate increases in the Other Southwest area (*id.* at 27-29).

Though the court held that these observations did not warrant setting aside the Commission's order, it emphasized that its judgment upholding the order was not meant to foreclose further consideration and modification of the order by the Commission "in light of existing market data" (*id.* at 8) and in accordance with the public interest (*id.* at 26, 29).[5]

3. Petitioner here contends: (1) that the ceiling rates for flowing gas are inadequate (Pet. 14-16); (2) that the Commission failed to provide a sufficient allowance for increased royalty obligations (Pet. 16-19); (3) that the refund credit program is unduly discriminatory, anticompetitive, and contrary to the provisions of the Natural Gas Act (Pet. 13-14); (4) that the moratorium on increased rate filings is invalid (Pet. 19-20);

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[5]The same approach had been taken by the court of appeals when it upheld the first of the Commission's two rate orders for the Southern Louisiana producing area. See *Southern Louisiana Area Rate Cases*, 428 F. 2d 407, 445 (C.A. 5), on rehearing, 444 F. 2d 125, 126-127, certiorari denied, 400 U.S. 950.

and (5) that the court of appeals, having expressed reservations about the Commission's order and having noted its departures from other area rate orders, should have set it aside rather than upholding it (Pet. 20-22).

With respect to the last of these contentions, we note that the court of appeals upheld the order despite its reservations because it correctly concluded that the Commission "acted within the 'zone of reasonableness,' which we accord to administrative action" (Pet. App. 8). The court properly determined that the order should be sustained, while recognizing that the Commission retains the authority to make appropriate changes in light of more recent data.

We also believe that the court properly rejected each of petitioner's other contentions. The issues presented by those contentions, however, are substantially identical to the issues presented by the pending petitions in the second *Southern Louisiana* case (Nos. 73-437, 73-457, and 73-464). We have urged the Court to grant certiorari in those cases to resolve a conflict between the Fifth and District of Columbia Circuits concerning, in part, the validity of refund credits as an incentive to elicit new supplies of natural gas for the interstate market. If the Court does so, its decision in those more comprehensive cases may answer each of the questions presented here. We therefore suggest that it would be appropriate to hold the present petition pending the disposition of the *Southern Louisiana* cases.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

LEO E. FORQUER,
General Counsel,
Federal Power Commission.

JANUARY 1974.